

FEB 8 1979

MICHAEL SODAK, JR., CLERK

78-1236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

BENNIE R. ARNOLD and HELEN L. ARNOLD, His Wife,
Petitioners,

VS.

JIM JOHNSON, PAUL SUMNER and EDWARD R. VARBLE, d/b/a
VARBLE REAL ESTATE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Kentucky

JERRY W. NALL
Suite 12-16, Odd Fellows Building
Owensboro, Kentucky 42301
(502) 684-5221
Attorney for Petitioners

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Civil Rules of Procedure Involved	2
Statement	4
Reasons for Granting the Writ	8
Conclusion	14
Appendix "A" Trial Order and Judgment	A-1
Appendix "B" Order of the Kentucky Court of Appeals	A-6
Appendix "C" Order of Supreme Court of Kentucky	A-8

TABLE OF AUTHORITIES CITED

Cases

Board of Trustees of P & F Retirement Fund v. Nuckolls, Ky., 481 S.W. 2d 36 (1976)	9
Country Club Tower Corporation v. Tower Management Corporation (D.C. Mont. 1967), 275 F. Supp. 468 ...	11
Davis v. Ann Arbor Public School (D.C. Mich. 1970), 313 F. Supp. 1217	12

Gibson v. Mississippi, 162 U.S. 565, 40 L. Ed. (1975) 16 S. Ct. 904	8
Huntington v. New York, CCNY 118 F. 683, affirmed 24 S. Ct. 505, 193 U.S. 441, 48 L. Ed. 740	11
Jackson v. Hepinstall, 328 F. Supp. 1104	11
Lind v. Schenley Industries, 278 F. 2d 79, 3rd Cir. (1960), Cer. Denied 364 U.S. 835 (1960)	14
Lyons v. Goldstein, 47 N.E.2d 146 (1943)	12
Nesvit v. Riesen, 148 A. 695, 298 Pa. 475, Cert. Den. 50 S. Ct. 408, 281 U.S. 754, 74 L. Ed. 1164	14
Willner v. Committee on Character and Fitness, 83 S.Ct. 1175, 10 L. Ed. 2d 224	12

Constitutional Provisions

United States Constitution XIV Amendment ...	2, 8, 11, 13, 14
--	------------------

Rules

Kentucky Rule of Civil Procedure, Rule 60.02 ..	3, 6, 9, 10, 13
Kentucky Rules of Civil Procedure, Rule 60.04 ..	3, 5, 7, 11

Texts

Moore's Federal Practice, Volume 6A-59-163	14
--	----

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

BENNIE R. ARNOLD and HELEN L. ARNOLD, His Wife,
Petitioners,

vs.

JIM JOHNSON, PAUL SUMNER and EDWARD R. VARBLE, d/b/a
VARBLE REAL ESTATE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Kentucky

Come the Petitioners, Bennie R. Arnold and Helen L. Arnold, his wife, and Petitions for a Writ of Certiorari to Review the Order and Judgment of the Supreme Court of Kentucky entered in this case on November 14, 1978.

OPINIONS BELOW

The Opinion of the McLean Circuit Court (trial court in Kentucky) was entered on September 22, 1977 (App. "A", in-

fra, pp. A-1-A-5). The Order of the Kentucky Court of Appeals was entered on June 27, 1978 (App. "B", infra pp. A-6-A-7). The Order and Judgment of the Supreme Court of Kentucky denying Petitioners' Motion for a Discretionary Review of the prior orders of the Kentucky Court of Appeals was entered on November 14, 1978 (App. C, infra p. A-8).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

(a) Did not the actions of the Kentucky Court of Appeals and the Supreme Court of Kentucky in dismissing Petitioners' appeal in view of all the facts and circumstances of this case effectively deny and deprive the Petitioners of their property without due process of law and in violation of the due process clause of the XIV Amendment of the Constitution of the United States.

(b) Did not the acts of the Kentucky Court of Appeals and the Supreme Court of Kentucky in dismissing Petitioners' appeal in view of all the facts and circumstances of this case, constitute a gross abuse of discretion and judicial power in view of the fact that the Petitioners will lose their property without a final adjudication?

CONSTITUTIONAL PROVISION AND RULES OF CIVIL PROCEDURE INVOLVED

The applicable portion of Section I of the XIV Amendment of the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The applicable portion of Rule 60.02 of the Kentucky Rules of Civil Procedure provides:

"On Motion, a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds . . .

- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02;
- (3) Perjury or falsified evidence . . . or
- (6) Any other reason of an extraordinary nature justifying relief."

Rule 60.04 of the Kentucky Rules of Civil Procedure provides:

If a proceeding by motion or independent action is commenced under Rule 60.02 or 60.03 while an appeal is pending from the original judgment in the Court of Appeals and prior to the time an opinion is rendered, the party commencing such proceeding shall promptly move the Court of Appeals to abate the appeal until a final order is entered therein. *When the trial court has entered such final order, the party who moved for abatement shall promptly file with the Clerk of the Court of Appeals a certified copy thereof.*

STATEMENT

The case arises out of an action below by the Respondent Jim Johnson in the McLean Circuit Court, State of Kentucky, against the Petitioners for specific performance of a purported Real Estate Agreement and for damages.

The Petitioner filed a Counter-Claim and a Third Party Complaint in the McLean Circuit Court against Jim Johnson, Paul Sumner and Edward R. Varble d/b/a Varble Real Estate based upon a conspiracy between the Respondents and false representation relative to the attempted purchase of the property from the Petitioners.

On April 26, 1978 and while the appeal was pending before the Kentucky Court of Appeals the Petitioners filed a Motion in the McLean Circuit Court requesting the trial court to set aside the trial order and judgment which was entered in the McLean Circuit Court on September 22, 1977 due to the fact that falsified evidence had been presented to the lower court and to the jury.

The Motion was not filed earlier in the McLean Circuit Court for relief based upon falsified evidence because the witness did not sign the Affidavit until April 26, 1978. The falsified evidence in its entirety did not come to the attention of the Petitioners and their attorney until a few days before the expiration of time for the Petitioners to file their Brief with the Kentucky Court of Appeals.

A certified copy of the Motion for Relief from Judgment and Order including the Supporting Affidavit as to falsified evidence was mailed for filing with the Kentucky Court of Appeals on April 26, 1978, together with Petitioner's Motion to abate the appeal and for an extension of time in which to file their brief. The brief was not due until several days later.

It was the position of the Petitioners that there was no need to file their Brief or to proceed further in the Kentucky Court of Appeals since there was a possibility that the trial Order and Judgment entered in the McLean Circuit Court would be set aside. An Order was entered by the McLean Circuit Court denying Petitioner's Motion for relief from Judgment and Order on May 22, 1978.

The Petitioners did not receive promptly from the McLean Circuit Court a certified copy of the Order as required by Kentucky Civil Rule 60.04 but instead received an attested copy.

In order to obtain said certified copy Petitioner's attorney was required to travel to Calhoun, McLean County, Kentucky for the sole purpose of obtaining a certified copy of the Trial Court's Order.

Immediately upon the obtaining of said certified copy of the Order it was mailed that same day, May 31, 1978, to the Court of Appeals along with Petitioners' Motion to set aside the Order of abeyance to continue the appeal.

Petitioners' brief was tendered with the Court of Appeals on the same day their Motion to set aside the Order of Abeyance. *There is no time lost in the procedural steps in the Appeal.*

The Kentucky Court of Appeals, on May 26, 1978, entered three Orders in the case. The Court of Appeals granted Petitioners' Motion to Abate, the Court further denied Petitioners' Motion for Extension of Time in which to file their Brief, and the Court also denied Respondents' Motion to Dismiss the Appeal.

The Kentucky Court of Appeals on June 27, 1978, having considered the Motions of the Respondent to Dismiss the Appeal for failure to timely perfect entered an Order dismissing the Appeal and passed without ruling Petitioners' Motion to

set aside the Order abating the appeal and to continue the appeal.

The Kentucky Court of Appeals in its Order of June 27, 1978, made the statement—"That the Appellants (Petitioners) did not promptly notify the Court of the trial court's ruling on Appellants' C.R. 60.02 Motion: The Petitioners contend that this statement by the Kentucky Court of Appeals is simply not true.

The Petitioners, as heretofore stated, did not receive promptly from the McLean Circuit Court Clerk a certified copy of the Order, but instead received an attested one.

When Petitioner's attorney called the office of the McLean Circuit Court Clerk requesting a certified copy of the lower court's Order, the clerk's office made the statement—"What's the difference between an attested copy and a certified one, and doesn't an attested copy satisfy the requirements of the Kentucky Court of Appeals".

The McLean Circuit Court Clerk's Office did not know where the certified forms were located and Petitioners' attorney had to describe the type of forms that were used in order for the clerk's office to find the necessary form to certify a court record.

Petitioners' attorney finally obtained a certified copy and it was immediately mailed on that same day to the Kentucky Court of Appeals along with Petitioner's Motion to set aside the Order of abeyance and to continue the Appeal.

The Petitioners filed their brief on the same day—May 31, 1978.

The Respondents filed their respective briefs prior to the Order of the Kentucky Court of Appeals dismissing the Appeal which was entered on June 27, 1978.

The Kentucky Court of Appeals had the briefs of all parties involved, and all other requirements had been made including the payment of the filing fee, in order for it to decide the appeal upon its merits prior to the entering of its Order of Dismissal on June 27, 1978.

The procedure of the Kentucky Court of Appeals was not upset to any extent because every step had been taken, including the filing of all briefs by all parties prior to the court entering its Order of June 27, 1978.

The Petitioners have been penalized in this case by the Kentucky Court of Appeals and the Supreme Court of Kentucky simply because they followed the requirements of Kentucky Civil Rule 60.04, which requires a certified copy of such Order to be filed with the Clerk of the Kentucky Court of Appeals.

It was humanly impossible to obtain the certified copy from the McLean Circuit Court Clerk prior to the time that it was actually so obtained and mailed to the Clerk of the Kentucky Court of Appeals.

A Motion for Discretionary review was filed with the Supreme Court of Kentucky requesting that court to grant the Petitioners a Discretionary Review of the Decision of the Kentucky Court of Appeals dismissing the appeal. The Supreme Court of Kentucky entered its Order denying a Discretionary Review of the Decision of the Kentucky Court of Appeals on November 14, 1978.

REASONS FOR GRANTING THE WRIT

The Petitioners respectfully request this Court to grant their request for a Writ of Certiorari because the home of the Petitioners is being taken from them without due process and in violation of the 14th Amendment to the Constitution of the United States.

The dismissal of the appeal by the Kentucky Court of Appeals deprives the Petitioners of the rights, privileges and immunities secured to them by the Constitution of the United States and particularly the right to due process of law and if the Petitioners do not obtain an appellate review of the proceedings in the trial court then the home of the Petitioners will be taken from them without due process.

The dismissal of the appeal by the Kentucky Court of Appeals was not in the interest of furthering justice but it deprived the petitioners of the rights, privileges and immunities secured to them by the Constitution of the United States and particularly the right to due process of law prior to trial and/or the right to proceed in the courts of law without obstruction.

The 14th Amendment of the United States Constitution places restraints only on the actions of the states. State action within the inhibitions of the 14th Amendment includes all of the actions infringing the rights secured thereby, whatever the state agency taking the action and whatever guise in which it is taken.

It includes actions by a state legislator, STATE COURTS, or state executive or administrative officers, municipal ordinances, the actions in the office of municipal offices and the acts of a state political subdivision and administrative agency. *Gibson v. Mississippi*, 162 U.S. 565, 40 L. Ed., 1975, 16 S. Ct. 904.

The Procedure in the Kentucky Court of Appeals was not upset to any extent in this case and thereby the recent Kentucky case of *Board of Trustees of P & F Retirement Fund v. Nuckolls*, Ky., 481 S.W. 2d 36 (1976), should have been followed by the Supreme Court of Kentucky.

In the *Nuckolls case Supra* after the Notice of Appeal was filed from the first judgment in the trial court the claimant failed to notify the Kentucky Court of Appeals of his Motion before the lower court to set aside the judgment under CR 60.02 providing that the court may relieve a party from its final Judgment. The Kentucky Court of Appeals held that it was not mandatory for the Claimant to have moved the Court of Appeals to abate the appeal until a final Order was entered in the circuit court where there had been nothing more than the filing of the Notice of Appeal by the claimant.

The Kentucky Court of Appeals in rendering its decision in the *Nuckolls case* stated as follows:

"This court in rendering its decision in the *Nuckolls case* stated as follows:

It has been called to our attention that Nuckolls failed to notify this court of the proceedings under CR 60.02. It is provided by CR 60.05.

If a proceedings by motion or independent action is commenced under Rule 60.02 or 60.03 while an appeal is pending from the original judgment in the Court of Appeals and prior to the time an opinion is rendered, the party commencing such proceedings shall promptly move the Court of Appeals to abate the appeal until a final order is entered therein. When the trial court has entered such a final order, the party who moved for abatement shall promptly file with the clerk of the Court of Appeals a certified copy thereof."

When is "an appeal pending"? Is it when the notice of appeal is filed? or when the record is received by the Court of Appeals? or when the case is docketed? or when the bond for cost is filed? The question cannot be answered by saying the appeal begins when the lower court loses jurisdiction for that is but another way of presenting the problem. For some purposes either the Court of Appeals or the circuit court has the right to act. For example, it is provided in CR 75.08 that after a record has been transmitted to the Court of Appeals may correct the record. Another example is that either court may extend the time for filing the record on appeal. CR 73.08, Cf., German Bros. Motor Transp. v. Flora, Ky., 262 S.W. 2d 821 (1953). There is no fixed time as to when "an appeal is pending" covering all situations. It is not determinable without looking at the facts of an individual case and defining the purpose for which the inquiry is made.

The obvious reason for requiring a movant under CR 60.02 to notify the Court of Appeals is to let the court know the motion is pending so it will not take further steps until the motion is adjudicated in a lower court. Since there was nothing more than the filing of the notice of appeal by Nuckolls, this court had not been called on to act. **The motion, pursuant to CR. 60.02, would not have upset the procedure in the court of appeals to any extent. We consider it not mandatory, therefore, in the instant case that Nuckolls move the court of appeals to abate the appeal until a final order was entered in the circuit court.** (Emphasis added)

In this case, as heretofore repeatedly stated, the procedure of the Kentucky Court of Appeals was not upset to any extent because every step had been taken, including the filing of all briefs prior to the Court entering its Order of Dismissal on June 27, 1978.

The Petitioners were penalized because they followed the requirements of Kentucky Civil Rule 60.04 which requires a certified copy to be filed with the Clerk of the Court of Appeals when it was humanly impossible to obtain the certified copy prior to the time that it was actually so obtained and mailed to the Clerk of the Kentucky Court of Appeals.

Amendment XIV U.S.C.A. Constitution, Section I reads as follows:

"No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor to any person within its jurisdiction the equal protection of the laws."

A final judgment of a state court construing a state statute so as to make it, although appear innocuous, but which interferes with property rights is an act of the state. Huntington v. New York, CCNY, 118 F. 683, Affirmed 24 S. Ct. 505, 193 U.S. 441, 48 L. Ed. 740.

Due process requires an opportunity for a hearing appropriate to the matter of the case at a meaningful time and in a meaningful manner. *Jackson v. Hepinstall*, 328 F. Supp. 1104.

If a state court in application of a local law deprives a person of some right without a hearing, the action of the state court may be set aside because it is wanting in "due process" and in such case, the wrong may be righted by the Supreme Court of the United States sitting in its appellate capacity.

Country Club Tower Corporation v. Tower Management Corporation (D.C. Mont. 1967), 275 F. Supp. 468.

The "Due process of law" clauses of the United States Constitution and the state constitutions can be satisfied only when

a person may be granted a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights. *Lyons v. Goldstein*, 47 N. E. 2d 146 (1943).

The hearing in this case would have been when the court of appeals considered the appeal in its entirety upon its merits.

When the Kentucky Court of Appeals entered its Order of June 27, 1978, dismissing the appeal, when everything had been done in the case including the filing of all briefs it arbitrarily and capriciously violated the constitutional rights of the Petitioners under the due process clause of the United States Constitution.

The standard for determining whether one has been afforded "Procedural due process" is whether he has been treated with fundamental fairness in the light of the total circumstances. *Davis v. Ann Arbor Public School* (D.C. Michigan 1970), 313 F. Supp. 1217.

The requirements of fairness does not relate solely to the matter of evidence in a case but also extends and includes the procedure matters in the case from the beginning to the final step. Willner v. Committee on Character and Fitness, 83 S. Ct. 1175, 10 L. Ed. 2nd 224.

The Petitioners' home is involved in this matter. The order dismissing the appeal amounts to the taking of the appellants property without due process and in violation of Amendment XIV to the Constitution of the United States.

Judicial decrees which violate fixed rights are prohibited by the XIV Amendment to the Constitution. *Nesvit v. Riesen*, 148 A. 695, 298 Pa. 475, Certiorari Denied 50 S. Ct. 408, 281 U.S. 754, 74 L. Ed. 1164.

As heretofore stated, and for the purpose of again bringing it to this court's attention the Order in the trial court over-

ruling Appellants' CR 60.02 Motion was entered on May 22, 1978, and the Petitioners finally obtained a certified copy of the Order by traveling to Calhoun, Kentucky, on May 31, 1978. A certified copy of the Order was mailed to the Clerk of the Kentucky Court of Appeals on May 31, 1978.

The clerk of the trial court mailed an attested copy on May 23, 1978, and it was received by the Petitioners on May 25, 1978. In other words, three working days had expired from the day the Petitioners received notice that the Order had been entered by the Trial Court to the time that a certified copy was obtained and mailed to the Court of Appeals.

It would certainly appear that the Kentucky Court of Appeals was notified promptly of the trial court's ruling on Petitioners' CR 60.02 Motion, and it would certainly appear that within the short time that had elapsed that there would have been no way that the procedure in the Kentucky Court of Appeals could have been upset to any degree.

The fact that Petitioner's attorney drove to another county several miles away for the sole purpose of obtaining a certified copy rather than waiting for it to be mailed to him should have illustrated to the Kentucky Court of Appeals that the Petitioners were acting promptly.

Again, as heretofore stated, and to stress the facts to this court . . . the procedure of the Kentucky Court of Appeals was not upset to any degree because all steps had been taken including the filing of all briefs prior to entering of the Order to Dismiss the Appeal on June 27, 1978.

The Kentucky Court of Appeals should have rendered a decision upon the merits of the case because it had everything before it to render such a decision based upon the facts and the merits.

Under Federal authority a gross abuse of discretion is reviewable by this court when there is a violation of the due process clause of the XIV Amendment. The federal rule is set out in Professor *Moore's Treatise Federal Practice*, Volume 6A-59-163, and footnotes, and we contend that this rule and the authorities cited therein, particularly *Lind v. Schenley Industries*, 278 F. 2nd 79 (3rd Cir. 1960), Cer. Den. 364 U.S. 835 (1960), is directly in point except in that case it involved the trial judge rather than an appellate court.

The Kentucky Court of Appeals and the Supreme Court of Kentucky in dismissing Petitioners' appeal in view of all the facts and circumstances of this case denied and deprived the petitioners of their property without due process of law and in violation of the due process clause of the XIV Amendment of the Constitution of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JERRY W. NALL
Suite 12-16, Odd Fellows Building
Owensboro, Kentucky 42301
(502) 684-5221

By JERRY W. NALL
Attorney for Petitioners

APPENDIX

APPENDIX A

McLEAN CIRCUIT COURT

CIVIL ACTION NO. 1845

**Jim Johnson
Plaintiff**

vs.

**Bennie R. Arnold and Helen L. Arnold, his wife
Defendants and Third Party Plaintiffs**

vs.

**Jim Johnson and Paul Sumner,
Edward R. Varble, d/b/a Varble Real Estate
Third Party Defendants**

Trial Order and Judgment

This action being called for trial on Tuesday, June 21, 1977, of the term of McLean Circuit Court, came the Plaintiff, Jim Johnson, by his attorney, H. Randolph Kramer; and the Defendants, Bennie R. Arnold and Helen L. Arnold, his wife, represented by their attorney, Jerry W. Nall; and the Third Party Defendants, Jim Johnson, by his attorney, H. Randolph Kramer, and Paul Sumner and Edward R. Varble, d/b/a Varble Real Estate, represented by their attorney, E. Louis Johnson, and announced ready for trial hereof.

Thereupon, the following named jurors, who after having been duly interrogated as to their qualifications and found to be qualified, were accepted by both sides, viz: Leonard Franklin Smith, Betsy Jones Woosley, Glenda Miller Stroud, Lynne

Scott, Amon Earl Geasly, John Haynes Thomas, Douglas Settle, Alice Joyce Crabtree, Leonard Nalley, Michael Edwin Coleman, Darrell Maxwell, James Clifton Welch; whereupon, the Clerk of this Court administered to the jury thus selected and accepted the oath prescribed by law.

Thereupon, a statement of Plaintiff's case was made to the jury by counsel.

Thereupon, a statement of Defendant's case was made to the jury by counsel.

Thereupon, a statement of Third Party Defendants' case was made to the jury by counsel.

Thereupon, the evidence in behalf of the Plaintiff's case was continued until the noon hour arrived at which time the Court admonished the jury relative to its duties and adjourned it until 1:00 p.m.

At the stated time, the Court reconvened, the parties litigant hereto were present and the jury heretofore sworn were in court and were seated in the jury box; whereupon, the evidence on behalf of the Plaintiff was resumed and concluded.

At the conclusion of the Plaintiff's evidence, came the Defendant and Third Party Defendants and moved the Court for a directed verdict, to which motion Plaintiff objected to the Defendant's motion and the Third Party Plaintiffs objected to the Third Party Defendant's Motion and the Court being advised, sustained Plaintiff's objection thereto and the Third Party Plaintiffs' objection thereto and overruled the Motion for a directed verdict to which ruling the Defendants and Third Party Defendants except.

Thereupon, the evidence in behalf of the Defendants was presented and concluded.

Thereupon, the evidence in behalf of the Third Party Defendants was presented and concluded.

At the conclusion of all the evidence in the trial, the Third Party Defendants, Jim Johnson and Paul Sumner, Edward R. Varble, d/b/a Varble Real Estate, moved for a directed verdict against the Third Party Plaintiffs, and the Court sustained said motion and directed a verdict for the Third Party Defendants, Jim Johnson and Paul Sumner, Edward R. Varble, d/b/a Varble Real Estate, to which ruling of the Court the Third Party Plaintiffs excepted and object.

Thereupon, the Defendants moved the Court for a directed verdict, to which Motion the Plaintiff objected and the Court being advised, sustained the Plaintiff's objection to the Defendant's motion and overruled the motion of the Defendant for a directed verdict, to which ruling the Defendants excepted.

Thereupon, the Court instructed the jury as in its Instructions numbered 1 through 5, which were filed and made a part of the record herein.

Arguments of counsel for the Defendant and the Plaintiff were heard and the case was thereupon submitted to the jury, and it retired to consider its verdict and returned into the Court with the following verdict, viz:

"We, the jury find for the Plaintiff, Jim Johnson"

It is, therefore, ordered and adjudged by the Court that the Defendants, Bennie R. Arnold and Helen L. Arnold, his wife, entered into a valid written contract with the Plaintiff, Jim Johnson, dated June 4, 1976, and that the said Jim Johnson is entitled to enforce said contract on its face and upon its terms, and that the Defendants, Bennie R. Arnold and Helen L. Arnold, his wife, shall specifically perform said Contract.

This, the 22nd day of September, 1977.

/s/ B. R. PAXTON
B. R. PAXTON
Judge
McLean Circuit Court

Prepared by:

/s/ E. LOUIS JOHNSON
E. LOUIS JOHNSON
Attorney for Third Party Defendants

Have Seen:

/s/ H. RANDOLPH KRAMER
H. RANDOLPH KRAMER
Attorney for Plaintiff

/s/ JERRY W. NALL
JERRY W. NALL

Certification

AOC-77-307

Case No. 77 CI 1845

Commonwealth of Kentucky
Court of Justice

Circuit Court
McLean County

Jim Johnson, Plaintiff,
v.
Bennie R. Arnold, Helen L. Arnold,
Defendants and Third Party Plaintiffs,
v.
Jim Johnson, et al., Third Party Defendants.

I, Richard Reno Clerk of the McLean Circuit Court, do certify that the following are true and correct copy(s) of the Trial Order and Judgment as recorded in the Office of the Circuit Clerk of McLean County.

In TESTIMONY WHEREOF witness my hand as Clerk aforesaid, this the 15th day of August, 1978.

/s/ RICHARD RENO
Clerk

/s/ By: (Illegible) T. COBURN, D.C.

APPENDIX "B"

**COMMONWEALTH OF KENTUCKY
COURT OF APPEALS**

No. 78-CA-205-I

Bennie R. Arnold and Helen R.
Arnold, his wife, Appellants,
v.
Jim Johnson, Paul Sumner, Edward
R. Varble, d/b/a Varble Real Es-
tate, Appellees.

Order

Appeal From
McLean Circuit
Court
No. 1845

**BEFORE: MARTIN, CHIEF JUDGE, REYNOLDS AND
WINTERSHEIMER, JUDGES.**

The Court, having considered the motions of appellees Sumner, Varble, and Johnson, to dismiss the appeal for failure to timely perfect, and the response thereto, and being otherwise sufficiently advised, it appearing that the appellants did not promptly notify the Court of the trial court's ruling on appellants' CR 60.02 motion and that appellants have had numerous extensions of time to perfect this appeal, ORDERS that the motions be and are hereby GRANTED. The motion of appellants to set aside the order abating the appeal and to continue the appeal is hereby PASSED WITHOUT RULING as being moot.

ENTERED: June 27, 1978.

/s/ (Illegible)
Chief Judge
Court of Appeals

**OFFICE OF
CLERK OF COURT OF APPEALS**

Frankfort, Kentucky 40601

Certification

I, John C. Scott, do hereby certify that the foregoing order granting motion to abate, denying motion for extension of time, and denying motion to dismiss, entered May 26, 1978; order granting motion to dismiss, entered June 27, 1978; and order denying motion for reconsideration entered August 2, 1978; in the case of Bennie R. Arnold, et al. vs. Jim Johnson, et al., File No. 78-CA-205-I, are true and correct copies as same appear on file in my office.

Done this 15th day of August, 1978, at Frankfort, Kentucky.

JOHN C. SCOTT
Clerk

/s/ By: JEANETTE TRUSTY
JEANETTE TRUSTY
Chief Deputy Clerk

APPENDIX C

SUPREME COURT OF KENTUCKY

78-SC-435-D

(78-CA-205-I)

Bennie R. Arnold, et al.,
v.
Jim Johnson, et al.,

Movants,
Respondents.

McLean Circuit
Court
1845

Order Denying Discretionary Review

The motion of Bennie R. Arnold, et al., for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED November 14, 1978.

/s/ (Illegible)
Chief Justice